NO. 73-1462

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

MARK WHITE, ET AL., APPELLANTS

V.

DIANA REGESTER, ET AL., APPELLEES.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

MOTION TO AFFIRM

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Now comes Diana Regester, et al., the original plaintiffs below, who together with Joe J. Bernal, et al., the Mexican American intervenors, and Wanda Chapman, et al., the Negro intervenors, and move to dismiss the appeal of the State of Texas for lack of jurisdiction or, in the alternative, that the decision below be affirmed.

STATEMENT

This is the second and hopefully final round of litigation dealing with the apportionment of the Texas State Legislature based upon the 1970 census.

Original Litigation

The story began in November of 1971 when separate actions were filed in each of the four judicial districts in Texas attacking the apportionment of the state house of representatives. It was alleged, first, that the entire scheme of apportionment was unconstitutional as containing the impermissibly large population deviations and, next, that multi-member districts used in certain urban areas unconstitutionally diluted the votes of Mexican Americans and Negroes living therein. Because of the shortness of time, it was stipulated that the plaintiffs would, in addition to the proof on the question of deviation, offer evidence as to only two of the multi-member counties. (Graves v. Barnes, 343 F. Supp. 704, 718 n. 7 (W. D. Tex. 1972). A three-judge district court was convened by Chief Judge Brown and heard the four cases in Austin, Texas, on December 13, 14 and 15, 1971.

The entire statewide scheme of apportionment was found to be unconstitutional on the basis of population deviation and the multi-member districts in Dallas and Bexar (San Antonio) Counties were held to dilute impermissibly and minimize

the votes of minority group members. The district court adopted plans of single-member apportionment for immediate implementation in the two multi-member districts. However, the court stayed its hand on the question of deviation to allow the legislature a chance to apportion itself. Graves v. Barnes, 343 F. Supp. 704 (W. D. Tex. 1972).

A stay requested by the state as to the immediate implementation of the single-member districts in Dallas and Bexar Counties was denied with opinion. Graves v. Barnes, 405 U. S. 1201 (1972). Probable jurisdiction was noted sub nom. Bullock v. Regester, 409 U. S. 803 (1972). This Court affirmed the decision to apportion the Dallas and Bexar County multi-member districts but reversed the trial court on the question of deviation. The case was remanded for further proceedings consistent with the opinion of this Court. White v. Regester, 412 U. S. 755 (1973).

On Remand

Immediately after the decision of this Court in White v. Regester, (Supra), the original plaintiffs and several sets of new plaintiffs filed additional interventions and three more original actions challenging the remaining multi-member state legislative districts in Texas.

The same three judges who heard Graves v. Barnes, 343 F. Supp. 704 (W, D. Tex. 1972) sat on these cases which were consolidated and heard on December 3, 4 and 5, 1973. In its decision

announced on January 21, 1973, the district court found that the multi-member legislative districts in Tarrant, Travis, El Paso, McLennan, Jefferson, and Nueces Counties operated to deny Mexican American and Negro voters in these counties an equal opportunity to participate in the political process. The Galveston County multi-member district was held to be the result of an unconstitutional gerrymander which divided the Negro community in such a manner as to effectively emasculate them. Relief was denied as to the Hidalgo County multi-member district. Single-member districts were ordered for each of the districts found to be unconstitutional except for Galveston where the legislature was allowed until July 1, 1975, to prepare a constitutional plan.

The parties were directed by the district court to file proposed plans of single-member apportionment on or before January 11, 1974, for each of the multi-member districts held unconstitutional. The state filed no plans by that deadline while the plaintiffs proffered single-member plans for each of the districts. On January 28, 1974, the date set for hearing testimony and argument on the proposed plans, the state offered plans for the Tarrant, Jefferson, Lubbock, Nueces and McLennan County districts. For the Nueces and McLennan districts all parties, including the state, were able to agree on a plan and the county merely adopted it. The plans offered by the state for Jefferson, Lubbock and Tarrant Counties would have perpetuated invidious dilution of minority voting strength by splitting the minority communities. The state's Jefferson and Lubbock plans had the further defect of spilling over into other legislative

districts, and if adopted would have necessitated some wholesale remodeling of the statewide scheme of apportionment.

The plans adopted by the court all were compact, contiguous and utilized census data and election studies to respect communities of interest. In addition, each of the court adopted schemes of apportionment was simply a division of the existing multi-member district and no other legislative districts were affected.

The state applied for and was granted a stay by Justice Powell on February 2, 1974 (A.J.S. 172C). A Motion to Vacate was denied by the Court, Justice Douglas dissenting, on February 7, 1974 (A.J.S. 174D).

ARGUMENT

THIS COURT LACKS JURISDICTION TO HEAR THE APPEAL BROUGHT BY THE STATE OF TEXAS

Appellees, Regester, Bernal and Chapman, have read the argument on jurisdiction contained in the Motion to Affirm filed by the Republican intervenors, Jack Warren, et al., and wish to join in that portion of their brief. In this connection, we would merely point out that the legislative districts under consideration in this case affected only 3% of the state's counties (8 out of 254) and barely over 18% of membership of the state legislature (27 out of 150). As such, it is highly analogous to Board of Regents of the University of Texas System v. New Left Education Project, 404 U.S. 541 (1972), where this Court noted that a direct appeal was not proper in a matter involving only 13% of Texas' four year colleges.

THE APPEAL OF THE STATE WAS NOT PROPERLY DOCKETED AND SHOULD BE DISMISSED

Appellees will not restate the matter contained in their Motion to Dismiss dated April 5, 1974, and in their Rejoinder dated April 27, 1974. However, Appellees wish to reurge their motion at this time.

IF THIS COURT HAS JURISDICTION THE DECISION OF THE TRIAL COURT IS CORRECT AND SHOULD BE AFFIRMED

The state's attack on the decision of the three-judge court represents little more than an argument on the sufficiency of the evidence. The state ignores the fact that the district court heard the testimoney of thirty-nine witnesses (twenty-two in person during the three days of trial and seventeen more by deposition); that the district court received close to three hundred exhibits (including detailed analysis of statistical and electoral data for each district); and that the district court had before it the entire record compiled during the litigation of Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972), (itself in excess of three thousand pages of record depositions and exhibits dealing with the Texas electoral system). The state would dispose of the seventy-one page opinion by the same district court that heard and decided Graves v. Barnes, (supra). The state would scuttle the findings of fact arrived at by a district court unquestionably familiar with the "context" and "special significance" of those facts, White v. Regester, 412 U.S. 755, 769-770 (1973). The state would bypass the trial court's conclusions pertaining to "peculiar local conditions and circumstances" found in seven of the largest urban areas in Texas. White v. Regester, 412 U.S. at 770 (1973). What the state really seeks is a trial de novo before this Court.

In White v. Regester, 412 U.S. 755 (1973), this Court made it plain that great weight was to be

accorded the findings of fact made by the district court in determining the effects of peculiarly local conditions. White, of course, considering local effects of the use of multi-member districts on two other Texas urban areas could not be more in point. See also Mayor of Philadelphia v. Educational Equality League, ___ U.S. ___ 42 U.S. L.W. 4405, 4410 n. 20 (March 26, 1974) where this Court once again reaffirmed this principle.

It would be impossible to catalogue and restate all of the evidence upon which the trial court based its findings and conclusions. Such a procedure would require a far more expansive brief than the rules of this Court comprehend. Rather, we will highlight some of the matters which the state omits in its jurisdictional statement.

District 32, Tarrant County

With a population of 675,499 persons, this nine man multi-member district is undoubtedly the largest state legislative district in the nation. It directly adjoins the Dallas County District, held unconstitutional in Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972) aff'd as to multi-member districts sub nom. White v. Regester, 412 U.S. 755 (1973). Appellees, Regester, Bernal and Chapman, are aware of the motion to affirm filed on behalf of Frank A. Escalante dealing exclusively with Tarrant County and rather than restate the arguments contained therein, wish merely to join in their motion as to Tarrant County.

District 7 - Jefferson County

The Beaumont-Port Arthur three man state legislative district contains almost a quarter of a million persons of whom slightly in excess of 34% are minority group members (J.S. 6). [1] Yet since Reconstruction no Negro or Mexican American has ever been elected to the state legislature from Jefferson County. For that matter, no minority group member has ever received the nomination of the White controlled Democratic Party for any office--an important factor in a county where the state's own witness confirmed that the Republican Party has never been a "factor" (Doyle dep. at 10). Exhaustive electoral analysis and even the state's witnesses confirm that white voters cast almost unanimous ballots against Negro candidates whenever they attempt to run for election (Oliver dep. at 56; Doyle dep. at 52). Even organized labor, the strongest political force in the county, has never endorsed a Negro or a Mexican American (Oliver dep. at 60) because "there is no way a local labor official... could recommend [endorsement of] a Black candidate, and then go back to his own rank and file and expect to be re-elected as an officer in the local union" (Id. at 78).

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[1] J.S. refers to the State's Jurisdictional Statement. A.J.S. refers to the separately bound Appendix to Jurisdictional Statement. Tr. refers to the trial transcript. Dep. refers to depositions, all of which were stipulated to be a part of the trial record.

On the social and economic level, the minority community continues to bear the burden of the white community's hostility. The record is uncontradicted in establishing a pattern of discriminatory employment practices in both the public and private sectors (Oliver dep. at 14; Nisby dep. at 7-12; 17). The minority community, almost entirely ghettoized, suffers twice the county's unemployment and poverty (Wright ex. 3). The schools remain highly segregated (Doyle dep. at 38). Community organizations are essentially one race with little or no social interaction between the races (Oliver dep. at 37). Dr. Charles Cotrell, a political scientist who appeared as an expert witness for the plaintiffs in both this and the Graves case (supra), was able to conclude, based upon a comparative study, that the adverse affect of the multi-member district on minority political participation in Jefferson County was "worse"than it was in Dallas County (Tr. 638). There was no attempt made by the state to contradict this testimony. It is little wonder the opinion of the trial court concludes that the Jefferson County mult-member district contains "virtually every element contributing to the dilution of the minority voice in representative government..." (A.J.S. at 19).

District 35 - McLennan County (Waco, Texas)

Negroes and Mexican Americans account for almost one-fourth of this two member district's population of 150,000 (J.S. at 6). Yet no minority group member has ever been the nominee of the Democratic party, let alone been elected to the state legislature in this one party county (Gilbert dep. at 16). The

record is replete with extensive studies documenting the fact that Mexican Americans and Negroes experience economic, social and educational discrimination similar to that found in Jefferson County (Moreno ex. 38). Indeed the State of Texas did not seriously contest the case at the trial level. Their only witness, a former state representative, testified that no Mexican American or Negro could ever be elected to the legislature under the multi-member district system because "our people have not reached that degree of sophistication" (Moore dep. at 24). In the multi-member district, Moore concluded that the votes of minority group members are diluted and the people feel alienated from the system:

> I think the Blacks have just become so discouraged. It doesn't make any difference who runs; they feel they are not going to get much out of it one way or the other (Moore dep. at 13).

District 37 - Travis County

Of almost 300,000 persons living in the four man Travis County (Austin) multi-member district 32% are Mexican American or Negro (J.S. 6). Once again, minority political access has been minimal. Not only has no Mexican American or Negro ever been elected to the state legislature, but no minority group member has ever been nominated by the Democratic Party for a county-wide position. Once again, the state did not seriously contest the unconstitutionality of the multi-member district. The

state's only witness testified that the minority community had "little or no role to play" in determining who was to be elected to the state legislature and profited little from the performance of those elected (Tr. 721). In the opinion of the state's witness, the only minority group member who had ever come close to receiving the Democratic nomination for the state legislature was defeated in 1972 by the "racist campaign tactics" of his opponent (Tr. 719-720).

With no contradictory evidence offered by the state, the trial court identified "virtually every factor" found objectionable in the Dallas and Bexar County multi-member districts (A.J.S. 32A).

District 75 - Lubbock County

Of the almost 150,000 people living in this two man multi-member district almost 25% are minority (J.S. 6). Here as in Travis and McLennan Counties, the state did not seriously contest the plaintiffs' case. Their only witness, the county Democratic chairman, confirmed that the multi-member district made it virtually impossible for a minority to be elected because at least 25% of the whites would vote against a Mexican American or a Negro no matter what his qualifications were (Sowder dep. at 25). As one might expect, the social, economic and educational situation of minority group members is appalling. For example, although comprising almost one-third of the school age population only 18 Mexican American graduates of the Lubbock public schools have ever received a college degree (Howell dep. at 13). Indeed in excess of 60% are dropouts before the

completition of the 8th grade (Moreno ex. at 26). Socially and economically, the minority condition is equally bleak (Moreno ex. 41). Extensive surveys undertaken by Dr. Baird, a political scientist and resident of Lubbock, indicate that half of the white voters still harbor stereotypes of Mexican Americans as lazy, emotional, having low ambition and the like (Tr. at 564). Mexican Americans and Negroes were finally admitted to all of the public swimming pools in the county only two years ago, were denied service in restaurants last year and were prevented access to motion picture theaters in the mid 1960's (Tr. 405; Rangel dep. at 5-9; Salinas dep. at 6-22; Howell dep. at 16-18 and Ex. 4 and 5 attached thereto). The effects of the social and economic strife is hardly surprising--since Reconstruction only two minority group members have ever been elected to any office. When asked to explain this minimal political participation, the state's witness identified racial discrimination as "a substantial factor" and then added that the cost of running for an at-large post also disadvantaged the economically insecure minority residents (Sowder dep. at 48). In totally uncontested expert opinion, based upon extensive electoral analysis and personal interviews, plaintiffs' expert, Dr. Cotrell, concluded that "as a legal framework...[the multi-member district] continues to discriminate against minorities in voting participation and continues to submerge; dilute and otherwise cancel their voting strength and effectiveness" (Tr. 571). Indeed, the state's witness agreed that without single-member districts there would be no foreseeable minority political participation (Sowder dep. at 34, 38).

District 73 - El Paso

Of the almost 300,000 persons living in the four man multi-member district comprising this west Texas urban area, 56.8% are Mexican American and 2.8% Negro (J.S. 30). The apparent majority enjoyed by the minority population is deceiving since the raw census figures contain substantial numbers of Mexican nationals admitted to this country as permanent resident aliens and, of course not entitled to vote (McAlmon dep. at 24). After adjusting for these non-participants, the minority community represents almost exactly the same percentage of the population as they had in the Bexar County multi-member district found constitutionally impermissible in White v. Regester, 412 U.S. 775 (1973). Studies in evidence before the trial court indicate that Mexican Americans represent only 38% of the actual registered voters (McAlmon dep. at 8). Again, this is the exact percentage found in Bexar County.

Of the four state representatives elected from the El Paso multi-member district at time of trial, none was a Mexican American or a Black (Tr. 595). Since Reconstruction only four minority group members have served in the state legislature from El Paso (Id.). Yet in elections held by district, such as county commissioner, Mexican Americans had achieved substantial success (Tr. 466; Republicans Ex. 10).

A former county Democratic chairman summed up the reason for this lack of success in the multi-member district. A Mexican American candidate faces an "innate inborn...racism" on the part of the white community (McAlmon dep. at 16). One of the state's own witness could not dispute this and conceded that in the most recent city elections overt appeals were made to racial prejudice in order to defeat a Mexican American candidate for mayor (Tr. at 435). Both Democratic and Republican chairman described vicious, racially oriented whisper campaigns which occur every time a Mexican American or Negro run for office (McAlmon dep. at 17; Tr. 471-72). The analysis by the plaintiffs' witness, Dr. Cotrell, of all elections since Reconstruction in which Mexican Americans had run for the state legislature confirmed this testimony by indicating a pattern or voting along racial lines highly analogous to that he had identified in an identical study of Bexar County elections (Tr. at 600).

The lack of success of Mexican Americans in legislative politics is shown not only by their failure to achieve election, but also because of the lack of responsiveness of the El Paso delegation to their needs. Frank Owen, a former member of the El Paso legislative delegation testified as a witness for the state. On cross-examination he admitted being a steadfast opponent of the repeal of the poll tax (Tr. 454-455), one of the primary barriers to Mexican American political participation in Texas (Tr. 728). In the last session of the legislature, the delegation continued its history of poor performance among other ways by voting three to one against an increase in the Texas Minimum Wage Law (McAlmon dep. at 40).

District 48 - Nueces County (Corpus Christi)

Since Reconstruction only five Mexican Americans have been elected to county-wide office

inspite of the fact that they account for 43% of the county's population. Of these five persons, only two have been state legislators (Tr. at 764). When asked to explain this minimal participation, the state's main witness, DeWitt Hale, responded:

> I think it's the result of housing pattern discrimination and educational lack of opportunity (Tr. at 764).

Another state witness, the county Democratic chairman answered the same type of question as follows:

> [M]exican Americans have been discriminated against and you know that. This has kept them from participating. The Mexican American has been suppressed and held down economically and that is a fact...(Peeler dep. at 28).

One of the plaintiffs' witnesses, Dr. Hector P. Garcia, lifelong resident of Corpus Christi, former Ambassador and member of the United States Commission on Civil Rights, put it more tersely,

> We were traumatized for many years and we have not recovered... (Garcia dep. at 32).

All witnesses agree that Cisneros v. Corpus Christi I.S.D., 324 F.Supp. 599 (S.D. Tex. 1970) aff'd 467 F.2d 142 (5th Cir. 1972) (en banc) cert. den. 93 S.Ct. 3052 (1973) which found de jure segregation of Mexican Americans, as well as Negroes, has resulted in a serious polarization of the community along racial lines (Peeler dep. at 30; Montemayor dep. at 10; Tr. at 730). Indeed, the issue of bussing has been used effectively to turn out White voters in a city council election as recently as last year even though the city government has nothing to do with schools or student transportation (Garcia dep. at 17-19). The election analysis of Dr. Cotrell confirmed the fact that vast percentages of White votes are cast along strictly racial lines (Tr. at 614-618).

District 19 - Galveston County

Both the physical appearance of this two man multi-member district and the uncontradicted record indicate unmistakably that the minority population of Galveston County was the victim of a gerrymander which, in the words of a state representative from that county, had as a 'purpose...to dilute and wash down or neutralize the effect of black votes' (Tr. 240). The state offered no witness or explanation for the odd shape, characterized as a 'monstrosity' or for the fact that an integral part of the minority community in Galveston County was excised and attached to a virtually all-white legislative district including some of the highest income suburbs of Houston, Texas (See Wright Exhibits 1 and 2). Thus, in this county, where Negro voters had been able to achieve a certain degree of political leverage, their role was materially weakened by a pure and simple "gerrymander' (Tr. 240-241).

CONCLUSION

The questions presented by the State of Texas are identical to those considered by this Court last term in White v. Regester, 412 U.S. 755 (1973). Both White (supra) and this case dealt with the effect of multi-member districts on the Mexican American and Negro population in Texas urban areas. Both cases were decided by a trial court composed of the same three judges. The opinion of the district court in each case indicates that the same factors were considered in both cases. As the decision of the trial court attests, the appellees have presented "ample evidence to support findings that the political processes leading to nomination and election were not equally open," White (supra), 412 U.S. at 770, to Mexican Americans and Negroes.

WHEREFORE, the appeal of the State of Texas should be dismissed or in the alternative, the judgment of the district court should be affirmed.

Respectfully submitted,

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SANFORD JAY ROSEN
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By: _____
George J. Korbel

CERTIFICATE OF SERVICE

The undersigned, a member of the bar of this Court, hereby certifies that three copies of the foregoing motion has this the 6th day of May, 1974, been served upon each counsel of record for Appellees in accordance with the Rules of this Court, by depositing the same in the United States mailbox, with first-class postage, prepaid, addressed to said counsel at their post office addresses.

_____
George J. Korbel